Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

JAMES F. GEORGE, III and
MARGIE R. GEORGE,

*Petitioners,*

v.

CITY OF MORRO BAY;
SANTA LUCIA NATIONAL BANK;
GORDON HELD; and JULIA HELD,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Can standing be based solely on alleged non-compliance with 11 U.S.C. § 365(d)(4) without a showing of actual harm or injury when a surrender order is requested?

Does the Bankruptcy Court have jurisdiction to decide the rights of the parties under state law and constitutional law when an agreement is deemed to be rejected under 11 U.S.C. § 365(d)(4) without an adversary proceeding?

Is literal application of 11 U.S.C. § 365(d)(4) to a development agreement under California's Tideland Trust contrary to the Congressional intent in enacting the statute?

## LIST OF PARTIES

Petitioners are James F. George, III and Margie R. George.

Respondents are the City of Morro Bay; Santa Lucia National Bank; Gordon Held and Julia Held.

Wilhelm Hoppe and Tina Hoppe were appellees in the lower court but have settled in this case.

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## PETITION FOR WRIT OF CERTIORARI

James F. George III and Margie R. George respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 24, 1999.

This Petition is brought for two reasons. First, in order to resolve conflict between the holding of the United States Supreme Court and the Ninth Circuit and second, in order to resolve conflicts between the decisions of the Ninth Circuit and other circuits regarding application of 11 U.S.C. § 365(d)(4).

## OPINIONS BELOW

The May 24, 1999 opinion of the United States Court of Appeals for the Ninth Circuit that gives rise to this petition is partly published and partly unpublished by order of the Ninth Circuit. The published portion of the opinion is reported at 177 F.3d 885 and is reprinted in the Appendix hereto at page 1. The unpublished portion of the opinion is reprinted in the Appendix hereto at page 12. By order filed July 2, 1999, the Ninth Circuit denied the petition for rehearing and suggestion for rehearing en banc. The denial is reprinted in the Appendix at page 40.

The Order of the District Court for the Central District of California, which is unpublished, was filed September 24, 1997 and is reprinted in the Appendix hereto at page 16. The Order of the Bankruptcy Court for the Central District of California, which is unpublished, was filed April 12, 1996 and is reprinted in the Appendix at

page 22. The Order of the Bankruptcy Court for the Central District of California denying Petitioners' Motion for New Hearing was filed January 7, 1997 and is reprinted in the Appendix hereto at page 32. The Order of the District Court remanding to the Bankruptcy Court was filed October 6, 1995 and is reprinted in the Appendix hereto at page 33. The Order of the Bankruptcy Court was filed January 30, 1995 and is reprinted in the Appendix hereto at page 36.

## JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") was entered on May 24, 1999. The Court of Appeals denied a timely petition for rehearing on July 2, 1999.

This Petition for Writ of Certiorari is filed within 90 days of denial of the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter involves the following Constitutional and Statutory provisions:

**United States Constitution:**

Article I, section 8, clause 4 which provides that Congress shall have the power: **To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;**

Article I, section 8, clause 9 which provides that Congress shall have the power: **To constitute tribunals inferior to the Supreme Court.**

Article III, sections 1 and 2 which provide:

> Section 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during the continuance of office.
>
> Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between a state, or the citizens thereof, and foreign states, citizens, or subjects.

Amendment V which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on the presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offenses to be

twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

**Statutory Provisions:**

11 U.S.C. § 365(d)(4) provides:

(4) Notwithstanding paragraphs (1) and (2) in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

11 U.S.C. § 365(g) provides:

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract of unexpired lease of the debtor constitutes a breach of such contract or lease –

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under Chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

Federal rules of Bankruptcy Procedure, Rule 7001 provides in relevant part:

> An adversary proceeding is governed by the rules of this part VII. It is a proceeding (1) to recover money or property, except a proceeding to compel the debtor to deliver property to the trustee. . . .

California Government Code section 65865(a) provides:

> (a) Any city, county, or city and county, may enter into a development agreement with any person having a legal or equitable interest in real property for the development of the property as provided in this article.

California Government Code section 65867.5 provides:

> A development agreement is a legislative act which shall be approved by ordinance and is subject to referendum. A development agreement shall not be approved unless the legislative body finds that the provisions of the agreement are consistent with the general plan and any applicable specific plan.

## STATEMENT OF CASE

The facts of this case are ultimately uncomplicated. The Petitioners entered into a development agreement with the City of Morro Bay concerning certain real property which is part of the California Tidelands Trust. The Petitioners expended considerable time, effort, and moneys, including their lifesavings, to develop the property subject to the agreement.

In June 1994, the Petitioners filed for bankruptcy protection for reasons unconnected to the development agreement. After filing for bankruptcy protection, the Petitioners informed the City of Morro Bay that they intended to perform under the development agreement. Petitioners continued to make payments to the City of Morro Bay and in all other respects did perform as required by the agreement and were not in default under the agreement in any manner. Petitioners assumed the development agreement in their proposed Chapter 11 Reorganization Plan. Petitioners, however, did not make a formal motion to the Court to assume the development agreement.

The City of Morro Bay administers the California Tidelands Trust property within its city limits. The City of Morro Bay brought a motion for a surrender order which was granted by the bankruptcy court. As a result, the Petitioners lost their life savings and the City of Morro Bay reaped a financial windfall.

## SUMMARY OF REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals in affirming the lower court's decisions is inconsistent with decisions of the United States Supreme Court and other circuit courts of appeals in several ways.

Standing for the City of Morro Bay to request a surrender order is based purely on statute without any showing of harm to the City of Morro Bay. The Court of

Appeals' ruling completely omits any meaningful discussion of standing as required by federal case law.

The ruling of the Court of Appeals completely omits any discussion of the effect of rejection under 11 U.S.C. § 365(d)(4) as it pertains to bankruptcy practice in California and is subject to the California relief from forfeiture laws. The Court of Appeals' decision discusses only case decisions arising in the State of Washington which are inapplicable or inappropriate in determining such matters arising in the State of California.

The Court of Appeals' ruling conflicts with other decisions of other United States Court of Appeal Circuits.

The Court of Appeals' decision should not be permitted to stand. As explained below, the Court of Appeals' decision misapprehends the applicable law.

The fundamental concepts in this matter concerning applicability of 11 U.S.C. § 365(d)(4) involves a rule of national significance and national application. Further, bankruptcy courts should operate under a uniform rule concerning their obligation to determine the true nature of agreements as applied to 11 U.S.C. § 365(d)(4); the meaning and effect of rejection as applied; and the necessity of standing in applying for surrender orders.

The decision of the Court of Appeals has the drastic effect of depriving Petitioners, who were not otherwise in default, of their "fresh start" under the Bankruptcy Code; depriving Petitioners of their livelihood and assets necessary to sustain that livelihood; and giving to local governmental entities substantial financial windfalls thereby depriving creditors of any payment at all. This has all

been accomplished without an adversary proceeding in violation of due process rights under the Fifth Amendment to the United States Constitution.

As to the characterization of the agreement subject to this action as a Lease subject to 11 U.S.C. § 365(d)(4), the Court of Appeals' ruling is contrary to both Ninth Circuit decision and California State Law, which is controlling, as to the nature of the agreement. The decision of the Court of Appeals has an impact not only on the Petitioners but also on an entire class of agreements in California that have been entered for the development of the California Tideland Trust lands.

## REASONS FOR GRANTING THE WRIT

### I.

### THE PETITION SHOULD BE GRANTED BECAUSE THE CITY OF MORRO BAY DID NOT HAVE STANDING TO REQUEST A SURRENDER ORDER FROM THE BANKRUPTCY COURT.

The Court of Appeals ruled that the City of Morro Bay as lessor could bring a motion for surrender order before the Bankruptcy Court without an adversary proceeding under a claim resting solely on a claim of rejection under 11 U.S.C. § 365(d)(4). This ruling ignores the United States Supreme Court ruling in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 482-83, 102 S.Ct. 752, 763-64, 70 L.Ed.2d 700 (1982) that absent injury, a violation of statute gives rise merely to a generalized grievance but not

standing. *See also Waste Management of North America v. Weinberger,* 862 F.2d 1393 (9th Cir. 1988).

The United States Supreme Court has held that the "irreducible constitutional minimum of standing" contains three requirements. First and foremost, there must be alleged and ultimately proven that an injury in fact has occurred; that a harm has been suffered that is "concrete", "actual or imminent", and not "conjectural or hypothetical". *Steel Co. v. Citizens For A Better Environment,* 521 U.S. 1143, 118 S.Ct. 1003 (1998). Standing is essential to establish the court's jurisdiction.

The great tragedy in this case is that the Petitioners were not in default under their agreement with the City of Morro Bay at the time they filed for bankruptcy protection. The Petitioners continued to make payments under the agreement. The Petitioners and the City of Morro Bay both understood that the Petitioners intended to continue with the agreement. The City of Morro Bay suffered no harm or injury of any kind as a consequence of the actions of the Petitioners. The Petitioners included the assumption of the agreement as part of their Chapter 11 Reorganization Plan. In spite of this, the City of Morro Bay has reaped a financial windfall at the expense of the Petitioners and their creditors.

Congress enacted 11 U.S.C. § 365(d)(4) because of concern over shopping center vacancies which often lasted until the debtor was forced to assume or reject the lease. The statute itself is often referred to as the "Shopping Center Amendment."

Enactment of § 365(d)(4) was designed to remedy an injustice in the Bankruptcy Code. In its prior form, the

Bankruptcy Code tied the hands of the owner/developer of a Shopping Center for an indefinite or prolonged period of time when a tenant, or a number of tenants, were in bankruptcy. In the Shopping Center setting, the landlord/developer commonly has a substantial monetary investment or commitment as a result of the development and is dependent on rental income to pay for the costs of the development, often including his own creditors who financed the project. Non-payment of rent over a prolonged period of time can result in the owner/developers **"insolvency and bankruptcy"**. Under such circumstances, the owner/developer receives back from the debtor possession of the owner/developers improvements. Under these circumstances, the owner/developer is made essentially whole by return of the leased premises. In this setting, the owner/developer and his creditors are permitted to move forward in a timely manner, while the debtor gets a fresh start.

The foregoing is the equitable course of action because the owner/developer has born substantially all of the financial risk by developing the Shopping Center.

**However, the result is much different where the debtor has born substantially all of the financial risk by developing the improvements on the ground lease. When the debtor has born substantially all the financial risk by developing the ground lease, application of 11 U.S.C. § 365(d)(4) to the detriment of the debtor will always result in an unfair and unjust result.**

Such an application of statute gives to the landlord all of the improvements made by the debtor to the exclusion of all other claims. Because the landlord risks little or

nothing, the result is a financial windfall to the landlord. The windfall can be so great, that a sophisticated landlord could be encouraged to undermine the unwary debtor. If such a windfall is irrelevant to the applicability of 11 U.S.C. § 365(d)(4), then the intent of the statute and the application of the statute are at odds.

In this matter, the City of Morro Bay has acknowledged that had the Petitioners filed a motion to assume within sixty (60) days of filing the bankruptcy petition, there would never have been an issue about surrender of the site. The result that has come about is strictly from the mechanical application of 11 U.S.C. § 365(d)(4).

The legislative history of 11 U.S.C. § 365 sheds light on this issue. The legislative history of the Bankruptcy Amendments of 1984 (P.L. 98-353) has been cited by the Ninth Circuit. *In Re Appetito's*, 893 F.2d 216 (9th Cir. 1990); and *In Re Southwest Aircraft Services, Inc.*, 831 F.2d 848 (9th Cir. 1987). The first problem "The Shopping Center Amendments" were designed to remedy was caused by long-term vacancies, and the partial operation of tenant space that was faced by mall operators to their economic detriment. The second, and related, problem was that the trustee usually stopped making payments due under the lease. A remedy was sought for this delay and uncertainty.

Delay and uncertainty referred to in the Court of Appeals' ruling were non-existent (See Appendix page 6). The Georges' payments to the City of Morro Bay were required to be paid in advance for a period of six months. The "rent" was fully paid in advance when the City filed its motion for a surrender order. In addition, the City

held a substantial security deposit from the debtors. The city had full assurance of the debtors' performance at the time the City filed the motion for a surrender order. The Court has noted in the past that standing is a threshold issue in such matters. *In re Dein Host, Inc.*, 835 F.2d 402 (1st Cir. 1987)

Cases remind us that the basic goal of the Bankruptcy Code is to protect the debtor against unscrupulous creditors by preventing them from taking unfair advantage of a debtor when in a vulnerable financial position, and also to protect the rights of all creditors to share equally in the assets of the debtors' estate. *In re Oak Farms, Inc.*, 37 B.R. 178 (Bankr. D. Minnesota 1984).

The United States Supreme Court has cautioned that the mere happenstance of bankruptcy should not result in a windfall to creditors. *Patterson v. Shumate*, 504 U.S. 753, 764, 112 S. Ct. 2242, 2249-50, 119 L.Ed.2d 519 (1992).

## II.

## THE PETITION SHOULD BE GRANTED BECAUSE THE BANKRUPTCY COURT LACKED JURISDICTION TO DECIDE THE RIGHTS OF PARTIES.

The actions of the Bankruptcy Court were contrary to and in violation of the ruling of the United States Supreme Court in *Northern Pipeline Construction v. Marathon Pipe*, 458 U.S. 50, 81-84, 102 S. Ct. 2858, 2877-78, 73 L.Ed.2d 598 (1982). The Supreme Court was clear that because Bankruptcy Courts are not Article III courts, the subject matter jurisdiction of the Bankruptcy Court is limited to the adjudication of congressionally created

rights under the Bankruptcy Code, and cannot include the adjudication of either State created rights or Federal Constitutional rights. Thus, the Bankruptcy Court can rule that a lease is rejected under operation of 11 U.S.C. § 365(d)(4) and that the rejection constituted a pre-petition breach, but the Bankruptcy Court cannot adjudicate the rights of the parties to the lease.

Granting this Petition for Writ of Certiorari would serve an important function of national significance. The application of 11 U.S.C. § 365(d)(4) has given rise to one of those rare situations where the literal application of a statute has produced results demonstrably at odds with the intention of the drafters. See *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242, 109 S. Ct. 1026, 103 L.Ed.2d 290, 299 (1989).

The widespread confusion and misapplication of 11 U.S.C. § 365(d)(4) has resulted in many law review articles. Two articles by Michael J. Andrew have attempted to shed light on the profound confusion surrounding 11 U.S.C. § 365. ***Executory Contracts in Bankruptcy; Understanding Rejection***, 59 University of Colorado Law Review, 845 (1988); and ***Executory Contracts Revisited: A Reply to Professor Westbrook***, 62 University of Colorado Law Review, 1 (1991). Michael J. Andrew's explanation that rejection does not cancel, repudiate, or terminate contracts, nor terminate state law rights in or to specific property is widely quoted. See ***Executory Contracts Revisited***, supra, page 3.

Confusion abounds in the application of rejection under 11 U.S.C. § 365(d)(4) by the Courts. Direction from the United States Supreme Court is essential to resolve

this conflict and to prevent the seemingly endless litigation that 11 U.S.C. § 365(d)(4) has created.

## III.

## THE PETITION SHOULD BE GRANTED BECAUSE REJECTION UNDER 11 U.S.C. § 365(d)(4) RESULTS IN A BREACH OF AN AGREEMENT THAT DOES NOT EXTINGUISH THE AGREEMENT.

The Court of Appeals' ruling omitted any meaningful discussion of the effect of rejection under 11 U.S.C. § 365(d)(4). The code itself at 11 U.S.C. § 365(g) considers rejection a breach and does not mention termination. In the underlying Bankruptcy decision in this matter, the Bankruptcy Court considered failure to assume a rejection that resulted in breach of the agreement. The Bankruptcy Court judge told the parties to deal with the State Courts to determine if the breach was a termination. In the end, the Bankruptcy Court judge issued the surrendered order presuming that the agreement was terminated by the failure to assume. In the end, the parties were subjected to inconsistent decisions by the Bankruptcy Court due to a lack of direction from the Court of Appeals on this matter.

The Court of Appeals' affirmation of the Bankruptcy Court order that the debtors must surrender is at odds with 11 U.S.C. § 365(g) which defines rejection as a prepetition breach.

The United States Supreme Court has ruled that when the meaning of a word is clearly explained in a statute, courts are not at liberty to look beyond the statutory definition. *Colautti v. Franklin*, 439 U.S. 379, 393, 99 S.

Ct. 675, 58 L.Ed.2d 596 (1979). As a rule, a definition which declares what a term means excludes any meaning not stated. *Perrin v. United States*, 444 U.S. 37, 42, 100 S. Ct. 311, 62 L.Ed.2d 199 (1979).

The Court of Appeals' ruling in this matter is in conflict with the Fifth and Eighth Circuits which have both taken the view that rejection operates as a breach of an existing and continuing legal obligation of the debtor, not as a discharge or extinction of the obligation itself. *In Re Modern Textile, Inc.*, 900 F.2d 1184, 1191 (8th Cir. 1990); and *Matter of Continental Airlines*, 981 F.2d 1460, 1460 (5th Cir. 1993).

## IV.

## THE PETITION SHOULD BE GRANTED BECAUSE A DEVELOPMENT AGREEMENT UNDER CALIFORNIA'S TIDELANDS TRUST IS NOT A "TRUE LEASE" SUBJECT TO 11 U.S.C. § 365(d)(4).

Case law is clear that in determining whether or not an agreement is a "true lease" to which 11 U.S.C. § 365(d)(4) is applicable, the nature of an agreement is to be determined by State Law. See *In Re Moreggia & Sons, Inc.*, 852 F.2d 1179 (9th Cir. 1988); *In re Harris Pines Mills* 862 F.2d 217 (9th Cir. 1988). The controlling California case law is *Airport Plaza, Inc. v. Blanchard*, 188 Cal. App. 3d 1594, 234 Cal. Rptr. 198 (1987). The Court states that a ground lease is a financing device for the development of unimproved property.

At the time of the hearing before the Court of Appeals, it was undisputed that neither the Bankruptcy Court nor the District Court had ever examined the

agreement at issue. The Court of Appeals itself for the first time has made a determination concerning the agreement. However, instead of referring to cases arising in California, the Court of Appeals cited cases arising in the State of Washington. *Port Angeles Waterfront Assocs. v. Port of Port Angeles (In Re Port Angeles Waterfront Assocs.)*, 134 B.R. 377 (BAP 9th Cir. 1991) which relies on another case arising from the State of Washington, *Sea Harvest Corp. v. Riviera Land Co.* 868 F.2d 1077 (9th Cir. 1989).

The Court of Appeals decision conflicts with *In Re PCH Associates*, 804 F.2d 193 (2nd Cir. 1986, and *Morregia*, supra. Both cases have held that only "true" or "bona fide" leases are subject to 11 U.S.C. § 365(d)(4). *Morregia* makes it clear that even if an agreement meets the state law definition of a lease, such finding does not mandate the mindless application of 11 U.S.C. § 365(d)(4). The substance of the agreement must fall within the scope of the type of agreements contemplated by Congress in enacting 11 U.S.C. § 365. See *Morregia* at pages 1183-84.

Although the Court of Appeals cites *Port Angeles Waterfront Associates* (Appendix page 7), Appellants would urge the Court to adopt the dissenting opinion in that case. The dissenting opinion is most consistent with the concepts as set forth in the *Moreggia* decision and California case law.

An agreement for the development of property is often called a ground lease. In arguing the matter before the Court of Appeals, there seemed little doubt that the nature of the agreement was a ground lease. As defined by California case law, a ground lease is a form of financing agreement. As a financing agreement, 11 U.S.C.

§ 365(d)(4) does not apply. The Court misapprehended that if it found the agreement between the City of Morro Bay and the Petitioners to be a lease, that the agreement must fall within 11 U.S.C. § 365(d)(4). This is contrary to the holding of the 9th Circuit in the *Morregia* decision.

In *Moreggia*, the Court cautioned against the "**mindless application of § 365.**" The Court set forth a standard of analysis that should be viewed as a duty on the part of the Court to examine the substance of an agreement in order to determine whether or not the agreement falls within the provisions of 11 U.S.C. § 365(d)(4). It is not necessary for the court to determine exactly what kind of agreement is at issue, but it is necessary for the court to determine that the agreement does or does not fall within the requirements of the statute. The Court should keep in mind that although the *Moreggia* Court found that the agreement at issue in that case was a "lease" that the *Moreggia* Court ultimately found that it was not a "true lease" falling under 11 U.S.C. § 365(d)(4). The Court of Appeals decision fails to take the steps necessary as set forth by the *Moreggia* Court.

The nature of the agreement in this matter is clearly a Development Agreement set forth as a ground lease. Under the holdings of the Ninth Circuit in *Morregia*, the agreement, as defined by *Airport Plaza, Inc. v. Blanchard*, must fall outside the requirements of 11 U.S.C. § 365(d)(4).

According to the terms of the agreement between the City of Morro Bay and the George, the obligations of the parties were as follows: development of the property by the Petitioners was to take several phases. These

included: (1) Demolition of existing structures; (2) Development and shoring of piers and building site; (3) Construction of commercial structures on land part of site; and (4) Construction of commercial docks and moorings on water part of site.

The annual costs to maintain the site was paid solely by the Petitioners. These costs included maintaining public restrooms and public common areas as well as preserving the public's access to the waterfront under the requirements of the California Tidelands Trust. These costs were in excess of $28,000.00 per year. In addition, the development work done by the Petitioners to that date was in excess of $500,000.00. The appraised value of the site was $700,000.00 with the Petitioners' improvements. The appraised value of the site without the improvements was de minimus.

The value of the improved site, without further improvement, would be conservatively projected to be in excess of $3,000,000.00 by the end of the agreement term in 2017. The income generated by the Petitioners from the site was in excess of $150,000.00 per year which was sufficient to fully fund the reorganization plan and provide full payment to all creditors.

The only obligation the City of Morro Bay had under the agreement was to collect money from the Petitioners. Payments to the City of Morro Bay over the life of the agreement would have been about $700,000.00. The value and income to the Petitioners over the life of the agreement would have been in excess of $6,000,000.00. At the time the Petitioners' property was taken from them through the Bankruptcy Court, the Georges' loss was

already in excess of the amount of payments due to the City of Morro Bay over the lifetime of the agreement.

At the time of Petitioners assumed the agreement with the City of Morro Bay, the site had been vacant for several years and in a condition of dilapidation and was a public nuisance.

The agreement describes the site **in such a state of dilapidation and disrepair as to be unusable.** The Petitioners were required to **commence the demolition, destruction, and removal** of buildings and to submit **findings by engineers, contractors, architects, and all other professionals necessary** and describing **all work necessary to make such buildings safe, clean and habitable. Construction of the project** was required to be completed **within two years.**

The agreement between the City of Morro Bay and the Petitioners was designed to allow the City of Morro Bay to do three things without having to expend City Funds. These were (1) To remove an eyesore which was an unsafe public nuisance from the waterfront; (2) Construct a commercial complex on the site that would generate revenue to the City of Morro Bay; and (3) Provide improvements to the waterfront to provide access and enjoyment of the waterfront to the general public as required under California's Tidelands Trust. As to this third point, it is important to note that under the Tidelands Trust, if the City of Morro Bay failed to develop the waterfront for the benefit of the public, the Tidelands Trust lands could revert back to the State of California.

The development of the property by the Petitioners was extensive. Demolition of substandard structures and

repair of the seawall alone cost the Petitioners in excess of $70,000.00 and this work only prepared the site for subsequent construction. Subsequent construction brought the development costs to over $500,000.00. In addition there were the initial acquisition costs of acquiring the ground lease.

The language of the agreement fits the definition for a **development agreement** as set forth in California statute. See California Government Code sections 65865 and 65867.5. The agreement sets forth the following factors which the City of Morro Bay itself claims are necessary for a development agreement: (1) The agreement was adopted pursuant to a vote by the City Council; (2) The agreement requires that the development comply with City planning and zoning decisions; and (3) The agreement requires compliance by the developer within specified time frames. In addition to approvals and permits from the City of Morro Bay, the project developed by the Petitioners was subject to approval by the California Coastal Commisision.

**If 365(d)(4) were determine to constitute a termination rather than a breach Petitioners would be entitled to relief from forfeiture.**

Related to these matters of standing and of equity is the application of relief from forfeiture. Under California law, which governs this agreement, Appellants would be entitled to relief from forfeiture.

The Court of Appeals's memorandum decision completely ignored the relief from forfeiture issue although it was briefed and argued both on appeal and at the Bankruptcy Court.

## IV. CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Dated: September 30, 1999

Respectively submitted,

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*Attorney for Petitioners*

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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|---|---|
| In re: JAMES F. GEORGE, III & MARGIE R. GEORGE, *Debtors.* | |
| JAMES F. GEORGE, III; MARGIE R. GEORGE, *Appellants,* v. CITY OF MORRO BAY; SANTA LUCIA NATIONAL BANK; WILHELM HOPPE; TINA HOPPE; GORDON HELD; JULIA HELD, *Appellees.* | No. 97-56628<br>D.C. No. CV-97-01463-ER<br>OPINION |

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
April 12, 1999 – Pasadena, California

Filed May 24, 1999

Before: Dorothy W. Nelson, Ferdinand F. Fernandez, and William A. Fletcher, Circuit Judges.

Opinion by Judge D.W. Nelson

## COUNSEL

Shane Kramer, San Luis Obispo, California, for debtors-appellants James F. George III and Margie R. George.

David M. Fleishman, David R. Hunt, Hunt & Associates, San Luis Obispo, California, for appellee City of Morro Bay.

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## OPINION

D.W. NELSON, Circuit Judge:

This case involves Chapter 11 debtors James F. George, III, and Margie R. George ("the Georges"). The Georges appeal the district court's order affirming the bankruptcy court's rulings. The bankruptcy court found that the Georges rejected their lease with the City of Morro Bay ("the City") under 11 U.S.C. § 365(d)(4) and that the City did not waive the right to assert that the lease had been rejected. The Georges argue that Section 365(d)(4) does not apply to the lease. Further, the Georges claim that the City waived its rights under Section 365(d)(4) and should be estopped from pursuing a surrender order. We hold that the agreement with the City is a true lease under Section 365(d)(4). We also find that the City did not waive its rights and that there are no grounds for estoppel. We affirm.

### *I. FACTUAL AND PROCEDURAL BACKGROUND*

In August 1987, the Georges entered a 30-year agreement, referred to as a lease in the agreement, with the

City regarding waterfront property known as the Harbor Center Project ("the property"). The property and the agreement are subject to administration under the so-called California Tidelands Trust Doctrine. *See Marks v. Whitney*, 6 Cal.3d 251, 258 n.5, (1971) (in bank) ("The state holds tidelands in trust for public purposes, traditionally delineated in terms of navigation, commerce and fisheries.")

The agreement provides for public access to the land and water of Morro Bay Harbor and requires the Georges to provide access to the tidelands and accommodations for the public. At their own expense and in accordance with the agreement, the Georges constructed and maintained pierage, docks, quays, and restrooms for the benefit of the public. The Georges also constructed commercial buildings that contained a restaurant, gift shops, clothing shops, and a cinnamon roll shop.

On June 7, 1994, the Georges filed for bankruptcy protection under Chapter 11 with the United States Bankruptcy Court for the Central District of California. The Georges, however, failed to assume the lease for the property under the bankruptcy within 60 days as required by 11 U.S.C. § 365(d)(4). Section 365(d)(4) states that if the debtor fails to assume or reject the lease within the 60 days, the "lease is deemed rejected and the Trustee shall immediately surrender such non-residential real property to the lessor." 11 U.S.C. § 365(d)(4).

After the Georges filed for bankruptcy, but before the 60-day deadline passed, the semi-annual rent payment to the City came due on July 1, 1994. The Georges were unable to pay the $14,205.52 demanded by the City. On

August 1, 1994, the Georges paid the City $4,735.14, representing rent for the months of July and August. On August 12, after the 60-day time period elapsed, the City demanded that the Georges pay the remainder of the past due rent and a percentage of gross sales rent. On August 26, 1994, the Georges tendered, and the City accepted, this payment in full.

Three months after the Georges' payments, the City filed a motion for surrender of the property pursuant to Section 365(d)(4). Before the bankruptcy court ruled on this motion, however, the Georges filed a motion attempting to assume the lease despite the lapsed deadline. The Georges argued that the lease was not a "true" lease under Section 365(d)(4) because of "peculiar property interests," that the City waived its rights under Section 365(d)(4) by accepting payments after the passage of the 60-day deadline, and that equity required the court to grant them relief. The bankruptcy court granted the City's motion to surrender the property and rejected the Georges' motion to assume the lease.

The Georges appealed these rulings to the district court. The district court remanded the case to the bankruptcy court for factual findings on whether or not the City showed an intent to waive its rights under Section 365(d)(4) by accepting the final payments from the Georges. On remand, the bankruptcy court made findings that the City had accepted the rent payment without full knowledge that the Georges had let the 60-day period pass and that the City did not have the intention of waiving its rights under Section 365(d)(4). The bankruptcy court also found that the City had a good faith belief that the rents it sought were post-petition rents to

which it was entitled. The bankruptcy court once again granted the City's motion for surrender of the property. The Georges again appealed to the district court. The district court affirmed the bankruptcy court on all grounds. The Georges appealed this decision to this court.

## *II. STANDARD OF REVIEW*

The role of the district court and this court are basically the same in the bankruptcy appellate process. *See Microsoft Corp. v. Dak Indus., Inc.* (*In re Dak Industries, Inc.*), 66 F.3d 1091, 1094 (9th Cir. 1995). Therefore, we review the bankruptcy court's decision directly. *See id.* We review the bankruptcy court's findings of fact for clear error, and its conclusions of law de novo. *See id.*

## *III. DISCUSSION*

In this appeal, the Georges challenge the district court's ruling affirming the bankruptcy court's order wherein the bankruptcy court granted the City's motion for a surrender order pursuant to Section 365(d)(4).

We resolve all of the Georges' remaining claims in this appeal in a memorandum disposition filed contemporaneously with this opinion.

### *A. Applicability of Section 365(d)(4)*

The Georges contend that their agreement with the City was not a lease but rather a "development agreement" under the California Tidelands Trust Doctrine and

therefore is not subject to the requirements of Section 365(d)(4). The Georges primarily rely on our decision in *City of San Francisco Mkt. Corp. v. Walsh (In re Moreggia & Sons, Inc.)*, 852 F.2d 1179 (9th Cir. 1988). The facts of *Moreggia*, however, are easily distinguishable from this case. In *Moreggia*, the agreement involved the right to occupy two vending stalls in a building constructed using redevelopment bonds. *See id.* at 1180. The "rent" was not related to the value of the possessory right but rather was collected only as needed by the city to repay the bonds. *See id.* at 1184. At the time of the bankruptcy filing, the debtor no longer had an obligation to pay rent. *See id.* at 1180.

The *Moreggia* court affirmed a bankruptcy court decision that the lease in question was not subject to Section 365(d)(4). *See id.* at 1181. The court focused on the "economic realities" of the agreement, *id.* at 1182, and relied on its finding that "[n]o true landlord/tenant relationship was ever intended or created." *Id.* at 1184. The *Moreggia* court also stressed that the debtor's remaining obligations were few, while its possessory interest was large. *See id.* The *Moreggia* court held that "the purpose of Section 365(d)(4) is to protect lessors from delay and uncertainty by forcing the trustee or debtor-in-possession to act quickly to assume unexpired leases." *Id.* at 1185 (citing *Southwest Aircraft Servs., Inc. v. City of Long Beach (In re Southwest Aircraft Servs., Inc.)*, 831 F.2d 848, 850 (9th Cir. 1987)). In *Moreggia*, the lessor had no expectation of further income from the debtor because there was no further payment obligation. Thus, the primary uncertainty that would exist under an ordinary lease – whether

the debtor would pay the rent – was not present in that case.

The facts of the case at hand are very different. The agreement between the Georges and the City had all the indicia of a landlord/tenant relationship. The Georges were required to pay rent over the course of the 30-year agreement, and the rent was tied to the Consumer Price Index and the fair market value of the property. There were penalties for late rental payments, and the Georges were required to put up a security deposit. Additionally, the Georges have no fee title to the land, and the agreement specifically notes that the lessor will take control of the land should the lease be terminated and take title to the improvements if they are not removed within 60 days of termination. In this case, the purposes of Section 365 are met by protecting the City, as lessor, from delay and uncertainty.

Notably, a case from the Ninth Circuit Bankruptcy Appellate Panel with almost identical facts also found that Section 365 is applicable to this type of agreement. In *Port Angeles Waterfront Assocs. v. Port of Port Angeles (In re Port Angeles Waterfront Assocs.)*, 134 B.R. 377 (B.A.P. 9th Cir. 1991), the appellants failed to assume their lease within the 60-day time period. The fifty-year lease involved waterfront property on which the tenant had built the structures and sub-leased portions of them. The BAP found the agreement to be a "true lease" under Section 365(d)(4). *See id.* at 379. We find the BAP's narrow reading of *Moreggia* in *Port Angeles Waterfront Associates* persuasive.

For these reasons, we hold that the agreement between the Georges and the City was a lease pursuant to Section 365(d)(4).

*B. Waiver and Estoppel*

The Georges next claim that because the City both demanded and accepted rent from them after the 60-day period to assume or reject had expired, it waived its rights under Section 365. Furthermore, the Georges claim that the City should be estopped from bringing the motion for a surrender order. We disagree.

Section 365 was substantially amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. Since these amendments, this court has not addressed the issue of whether the equitable doctrines of waiver and estoppel are available to prevent lease forfeitures under Section 365(d)(4). Bankruptcy courts from this circuit have disagreed over whether waiver is an option under Section 365(d)(4). *Compare In re VMS Nat'l Properties,* 148 B.R. 942, 944 (Bankr. C.D. Cal. 1992) (finding that the lessor waived its rights under Section 365(d)(4) by accepting pre-petition rents) *with In re Chandel Enters., Inc.,* 64 B.R. 607, 610 (Bankr. C.D. Cal. 1986) ("If either waiver or estoppel were applicable, the Congressional intent in enacting the 1984 amendments, eliminating uncertainty regarding the status of nonresidential leases and requiring the debtor-in-possession to take affirmative action to assume the lease, would be circumvented.") (citation omitted). Outside of this circuit, the authority is similarly divided. *Compare In*

*re Car-Gill, Inc.*, 125 B.R. 133 (Bankr. E.D. Pa. 1991) (lessors can waive application of Section 365(d)(4) by post-rejection conduct), *and Bethesda-Union Soc'y of Savannah, Inc. v. Austin (In re Austin)*, 102 B.R. 897 (Bankr. S.D. Ga. 1989) (same), *and In re T.F.P. Resources, Inc.*, 56 B.R. 112 (Bankr. S.D.N.Y. 1985) (same), *with In re Re-Trac Corp.*, 59 B.R. 251, 256 (Bankr. D. Minn. 1986) (waiver doctrine not applicable), *and In re Las Margaritas, Inc.*, 54 B.R. 98 (Bankr. D. Nev. 1985) (same). The Eleventh Circuit has applied the principles of waiver and estoppel to rights related to unexpired leases, although not to Section 365 explicitly. *See Ranch House of Orange-Brevard, Inc. v. Gluckstern (In re Ranch House of Orange-Brevard, Inc.)*, 773 F.2d 1166, 1169 (11th Cir. 1985) ("We are thus unwilling to limit as a matter of law a bankruptcy court's power to employ equitable doctrines of estoppel and waiver in adjudicating the rights of parties to an unexpired lease.").

We need not reach, however, the general question of whether a lessor's post-rejection conduct can waive the automatic rejection under Section 365(d)(4), because it does not affect the outcome in this case. Even assuming arguendo that waiver is possible under Section 365(d)(4), we find that the City did not waive its rights to enforce the rejection against the Georges.

To find that the City waived its rights under Section 365(d)(4), we would need to find "(1) the existence at the time of the waiver of a right, privilege, advantage or benefit; (2) the actual or constructive notice thereof; and (3) the intention to relinquish such right, privilege, advantage or benefit." *In re VMS Nat'l Properties*, 148 B.R. at 944. *See also In re THW Enters., Inc.*, 89 B.R. 351, 356

(Bankr. S.D.N.Y. 1988) (defining a waiver as "an intentional relinquishment of a known right").

In this case, there is no evidence that the City intended to relinquish its right to pursue a surrender order. On remand, the bankruptcy court made specific factual findings to address this factor. The bankruptcy court found that the City "did not, at any time or by any conduct, intentionally relinquish its right to have Debtors assume their lease of non-residential real property through the filing of a motion under [Section] 365(d)(4)." Furthermore, the bankruptcy court found that the City had a good faith belief that the rents it sought were post-petition rents to which it was entitled under Section 365(d)(3). After a thorough review of the record, we hold that these findings were not clearly erroneous. Therefore, the City did not waive its right to pursue a surrender order under Section 365(d)(4).

Next, the Georges argue that the City should be equitably estopped from asserting its rights under the code. Again, we need not decide whether the equitable doctrine of estoppel is available under Section 365(d)(4), because there are no grounds for estoppel in this case. The bankruptcy court made express findings of fact that "[t]here was no inequitable activity on the part of the [City] in the handling of this matter." Furthermore, the bankruptcy court found that the Georges "did not act diligently to protect their interest in the lease" and that the Georges have "unclean hands" due to a misrepresentation their attorney made to the City. Based on a careful review of the record, we hold that these findings were not clearly erroneous. Thus, equitable estoppel is not available to the Georges in this case.

## *IV. CONCLUSION*

For the reasons set forth above, the district court is affirmed. Section 365(d)(4) does apply to this agreement. Furthermore, we need not decide whether the equitable doctrines of waiver and estoppel are available under Section 365(d)(4). In this case, the City did not intentionally relinquish its rights under Section 365(d)(4) and there are no grounds for estoppel.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| In re: JAMES F. GEORGE, III & MARGIE R. GEORGE,<br>Debtors<br>JAMES F. GEORGE, III; MARGIE R. GEORGE,<br>Appellants,<br>v.<br>CITY OF MORRO BAY; SANTA LUCIA NATIONAL BANK; WILHELM HOPPE; TINA HOPPE; GORDON HELD; JULIA HELD,<br>Appellees. | NO. 97-55628<br>DC NO. CV-97-01463-ER<br>MEMORANDUM[1]<br>(Filed May 24, 1999) |

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding
Argued and Submitted April 12, 1999
Pasadena, California

Before: D.W. NELSON, FERNANDEZ, and W. FLETCHER, Circuit Judges.

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Chapter 11 debtors James F. George, III, and Margie R. George ("the Georges") appeal the district court's order affirming the bankruptcy court's rulings. The bankruptcy court found that the Georges rejected their lease with the City of Morro Bay ("the City") under 11 U.S.C. § 365(d)(4) and that the City did not waive the right to assert that the lease had been rejected.

We address the issues of whether this agreement was a lease under Section 365(d)(4) as well as the applicability of the equitable doctrines of waiver and estoppel in a published opinion filed concurrently with this memorandum disposition. In that opinion, we hold that this agreement is a lease under Section 365(d)(4). Furthermore, we conclude that we need not decide whether the doctrines of waiver and estoppel apply to Section 365. In this case, the City did not intend to waive its rights under Section 365 nor are there any grounds for estoppel. We resolve the remaining issues in this memorandum. The parties are familiar with the facts of the case and we discuss them only as necessary to explain our reasoning.

Issues of jurisdiction and standing are subject to de novo review by this court. *See Liberty Mutual Ins. Co. v. Official Unsecured Creditors' Comm. of Spaulding Composites Co. (In re Spaulding Composites Co. Inc.)*, 207 B.R. 899, 902 (B.A.P. 9th Cir.1997).

## I. Issues Not Raised to the District Court

Arguing against the surrender order on a variety of grounds, the Georges raise several issues to this court that they did not raise to the district court. Specifically,

the Georges argue that applying Section 365(d)(4) to the lease violates their constitutional rights. Furthermore, the Georges argue that California's anti-forfeiture statutes dictate against the surrender order.

The Georges raised the constitutional issues to the bankruptcy court for the first time in their motion for reconsideration. The bankruptcy court ruled that the arguments were not timely made and did not consider them on the merits. Furthermore, the Georges did not raise these issues to the district court. Similarly, there is no evidence in the record that the Georges raised the anti-forfeiture argument to either the bankruptcy court or the district court.

Ninth Circuit law is clear that except in cases involving jurisdictional questions or where particular circumstances suggest that injustice might otherwise result or that public policy requires, "this court declines to consider arguments for reversal that were not presented in the district court." *Ratanasen v. California Dept. of Health Serv.*, 11 F.3d 1467, 1473 (9th Cir.1993). These exceptions do not apply in this case. Therefore, we refuse to hear these arguments.

## II. Standing

The Georges also argue that the City does not have standing to bring a motion for surrender of the property because it did not suffer any harm. This argument fails for two reasons. First, this circuit has expressly determined in the context of Section 365(d)(4) rejections that it is appropriate for lessors to bring actions for surrender orders within the bankruptcy case. *See Anderson v. Elm*

*Inn, Inc. (In re Elm Inn)*, 942 F.2d 630, 634 (9th Cir.1991). Second, the City as the lessor of the property has a substantial interest in having appellants removed from the leasehold so it can find new tenants.

III. Third Party Interests

Next, the Georges argue that the surrender order was inappropriate because it affected the interests of third parties. They argue that the interests of their children, Santa Lucia National Bank, and Mildred Dennis were adversely affected by the surrender order. We agree with the district court, however, that the Georges have not shown that they have standing to assert the rights of non-parties. Therefore, this argument also fails.

IV. State Law

Finally, the Georges claim that the surrender order made determinations that are properly made only under state law. As the district court found, however, it was not state law that deprived the Georges of their leasehold interest. Rather, it was the provisions of 11 U.S.C. § 365(d)(4), which is a core bankruptcy matter. Therefore, we find that there is no right to a state court trial or jury.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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| MARGIE AND JAMES GEORGE,<br><br>Plaintiffs,<br><br>v.<br><br>CITY OF MORRO BAY, ET AL.,<br><br>Defendants. | No. CV 97-335 ER<br>CV 97-1463 ER<br><br>ORDER AFFIRMING BANKRUPTCY COURT IN No. CV 97-1463 ER, AFFIRMING BANKRUPTCY COURT'S ORDER IN PART AND DISMISSING APPEAL IN PART IN No. CV 97-335 ER<br><br>(Filed Sep. 24, 1997) |

The Court, having read and considered all of the briefs filed in support and opposition of these two consolidated matters, HEREBY ORDERS THAT

This appeal, which challenges the bankruptcy court's two orders dismissing this bankruptcy adversarial proceeding, No. 96-1073, within bankruptcy case No. 94-12409 RR, as to the City and Hoppe defendants for failure to state a claim upon which relief can be granted and as to the Bank and related defendants as a terminating discovery sanction, presented issues highly intertwined with those presented in the Georges' other bankruptcy appeal, District Court Case No. CV 97-1463 ER, which appeals the holdings of the underlying bankruptcy case, No. ND 94-12409 RR, specifically the bankruptcy court's holdings (1) that the Georges rejected under 11 U.S.C. § 365 (d) (4) the leasehold which is the

subject of this adversarial proceeding, and (2) that the City did not waive the right to assert that lease had been deemed rejected.

Argument was heard in this matter on August 25, 1997 in Courtroom 1, with the Georges present and represented by counsel, counsel for the City and related defendants present, and counsel for the Santa Lucia National Bank and related defendants absent.

[1] The Court will first address appeal no. CV 97-1463 ER, which addresses the bankruptcy court's Orders of April 15, 1996 and February 3, 1997, which reaffirmed the bankruptcy court's holding prior to this Court's remand, that there was no waiver by the City of Morro Bay of its rights under 11 U.S.C. § 365 (d) (4) to assert the failure of the debtors to assume their lease of nonresidential real property and so to deem the lease rejected by operation of law. The Court has read and conspired the briefs of the appellants, the appellees City of Morro Bay, which was joined by all of the other appellees, and the record on appeal, and has also considered the previous cases in this Court arising out of this bankruptcy case, and tentatively concludes as follows:

[2] The Court has jurisdiction to hear this appeal under 28 U.S.C. §§ 158 and 1334.

[3] The case was remanded to the bankruptcy court so that court could make factual findings as to whether the City of Morro Bay, through its conduct, "showed an intent to relinquish its rights under §354 (d) (4)" which was "so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of the conduct is possible."

The bankruptcy court has made its findings of fact on this issue after taking evidence in at least two hearings, which this Court now reviews for clear error. The bankruptcy Court found that the actions of the City in its communications with the debtors were not so manifestly consistent with a showing of an intent to waive its rights under section 365 (d) (4) that no other reasonable explanation was possible. The Court agrees. The actions of the City sent a message which was ambiguous at best. In the August 12 letter, the City claimed, and the bankruptcy Judge as the trier of fact believed, that the City sought only post-petition rents covering periods after the bankruptcy petition had been filed. In later correspondence, the City unequivocally indicated its belief that the lease had been deemed rejected, and even at one point offered the Georges a new lease to replace it. Despite the Georges' contention to the contrary, the distinction between pre- and post-petition rents is critical, because the lessor of property which has not been vacated has the right under 11 U.S.C. § 365 (d) (3) to collect rent during the post-petition period in the same amount as the lease states, but has no right to demand pre-petition rents. Because the bankruptcy court found as a matter of fact that the city had a good faith belief that the rents it sought were post-petition rents, and that the belief was consistent with the reasonable explanation seeking post-petition rents, the bankruptcy court did not err when it found that there had been no waiver by the City.

[4] The Court next addresses the debtors' argument that the City should be equitably estopped from asserting its rights under the bankruptcy code to move for a surrender order of the deemed rejected lease because of the

City's conduct. First, the Court notes that it was no conduct of the City which caused the debtor to fail to assume the lease. Second, the Court notes that the bankruptcy court did not allow the debtors to avail themselves of an equitable defense because the former counsel misrepresented that he had filed a motion to extend the time in which to assume the lease and so his misrepresentation rendered their hands unclean. The court below found that equitable estoppel is not available to the debtors, because if they relied at all on the representations of the City and believed that the City had waived its rights under the Code, such reliance was not reasonable under the circumstances. Even if the debtors could reasonably rely on the August 12 communication to believe that the City had waived its rights, such reliance could never been [sic] so after September 30 when the City unequivocally announced its intention to treat the lease as deemed rejected.

[5] As to the debtors' argument that the procedure for seeking a surrender order is insufficient unless (1) brought in an adversarial proceeding or (2) determined in the state court, the holding of *In re Elm Inns* is dispositive. The Ninth Circuit has expressly determined in the context of §365 (d) (4) deemed rejections that it is appropriate for lessors to bring actions for surrender orders within the bankruptcy case, without the need for adversary proceedings or state court trials and process.

[6] As to the debtors' two final arguments, specifically that the bankruptcy court had no jurisdiction to enter an order affecting the property rights of individuals other than the debtors, and that the debtors were entitled to a state court action to determine the outcome of their

leasehold interest, both fail. The debtors have made no showing that they have standing to assert the rights of non-parties, nor provided any evidence to show that the parties mentioned by them have any interest in the property as they allege. Finally, it was not state law which deprived the debtors of their leasehold interest, but operation of the provisions of 11 U.S.C. § 365, which is a core bankruptcy matter for which there is no right to a state court trial or jury.

[7] As to the appeal in this Court's case no. CV 97-335 ER, the appeal of the order of the bankruptcy court granting with leave to amend the City of Morro Bay and Hoppe defendants' motion to dismiss for failure to state a claim upon which relief can be granted, the Court holds that this appeal is DISMISSED, because the plaintiffs failed to take the appeal from a final order of the bankruptcy court. Dismissal with leave to amend a complaint is not a final order, and thus this Court lacks jurisdiction under 28 U.S.C. § 158 to hear an appeal of this Order, which is premature at this time. The plaintiffs should be allowed leave to amend their complaint in the bankruptcy court adversarial proceeding No. 96-01073 within Bankruptcy Case No. ND 94-12409 RR within 20 days of their receipt of this Order. The bankruptcy court should also consider this Court's ruling in its affirmance of the appeal no. CV 97-1463 ER, [¶s 1-6 above] in determining whether the complaint may survive.

[8] As to the appeal of the bankruptcy court's entry of judgment on the motion for terminating sanctions filed by the Santa Lucia National Bank and related defendants, the Court has reviewed the record and has concluded that

a factual basis existed for the grant of terminating sanctions and the bankruptcy court did not abuse its discretion when it dismissed the action for the plaintiffs' failure to comply with its discovery orders. The Court therefore AFFIRMS the judgment of the bankruptcy Court as to that order and Judgment.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail or by telefax, copies of this Order on counsel for the parties in this matter.

Dated: SEP 24 1997

/s/ Edward Rafeedie
EDWARD RAFEEDIE
United States District Court
Judge

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA,
NORTHERN DIVISION

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| In re:<br><br>JAMES F. GEORGE, III and<br>MARGIE R. GEORGE,<br><br>Debtors. | Case No. ND 94-12409-RR<br><br>On Remand from the United States District Court Central District of California Case No. 95-1300 ER<br><br>[PROPOSED] ORDER MAKING FURTHER FINDINGS, DENYING RECONSIDERATION, AND GRANTING SURRENDER ORDER<br><br>Date: February 26, 1996<br>Time: 10:00 a.m.<br>Place: 222 East Carrillo Street, Room 104 Santa Barbara, California<br><br>(Filed Apr. 12, 1996) |

There are two related motions which are the subject of this order, CITY OF MORRO BAY's MOTION THAT FURTHER FINDINGS BE MADE ON THE EXISTING RECORD, OR IN THE ALTERNATIVE, FOR SETTING OF AN EVIDENTIARY HEARING and Debtors' MOTION FOR RECONSIDERATION OF THE COURT'S RULING ON THE CITY OF MORRO BAY's MOTION THAT FURTHER FINDINGS BE MADE ON THE EXISTING

RECORD. There were three hearings held on these matters, December 20, 1995, February 9, 1996, and February 26, 1996. The Honorable Robin Riblet, Bankruptcy Judge, presided at all three hearings. This order is intended to, and does, address all material issues raised with respect to these two motions.

The matter of the CITY OF MORRO BAY's MOTION THAT FURTHER FINDINGS BE MADE ON THE EXISTING RECORD, OR IN THE ALTERNATIVE, FOR SETTING OF AN EVIDENTIARY HEARING was originally heard before this Court on December 20, 1995. The CITY OF MORRO BAY ("CITY") was present by and through its attorney, Philip F. Sinco, Esq. The Debtors were present by and through their attorney, Michael W. Stelzer, Esq. Robert M. Jones, Esq., appeared on behalf of interested party, SANTA LUCIA NATIONAL BANK. The matter was argued and submitted on the points and authorities, declarations, and documentary evidence previously filed with the court, and on oral argument presented on that day. At that time the Court made findings based upon the evidence in the record as set out below (FINDINGS OF FACT Numbers 5-6), but also ordered an evidentiary hearing with respect to the CITY's acceptance of rent on November 3, 1994. The evidentiary hearing was ordered to determine whether the CITY's Harbor Director's conduct in accepting the rent check on November 3, 1994, was so manifestly consistent with, and indicative of, an intent to relinquish voluntarily a particular right that no other reasonable explanation of the conduct was possible.

Prior to the evidentiary hearing, Debtors filed two motions, NOTICE OF MOTION AND MOTION FOR

CONTINUANCE RE: CROSS-EXAMINATION OF DECLARANTS AS TO THE INTENT TO WAIVE A DEEMED REJECTION OF LEASE UNDER 11 U.S.C. § 365(d)(4) and MOTION FOR RECONSIDERATION OF THE COURT'S RULING ON THE CITY OF MORRO BAY's MOTION THAT FURTHER FINDINGS BE MADE ON THE EXISTING RECORD. These motions were served and filed on or about February 1, 1996.

The evidentiary hearing ordered by the Court came on regularly on February 9, 1996 at 11:00 a.m. in this Court. The CITY OF MORRO BAY ("CITY") was present by and through its attorney, David R. Hunt, Esq. The Debtors were present by and through their attorney, Michael Stelzer, Esq. Mr. Benning Richardson was also present, and attempted to present argument before the Court. As an initial matter, the Court granted, in limited fashion, Debtors' MOTION FOR RECONSIDERATION OF THE COURT'S RULING ON THE CITY OF MORRO BAY's MOTION THAT FURTHER FINDINGS BE MADE ON THE EXISTING RECORD and set a further hearing on February 26, 1996, at 10:00 a.m. The hearing was ordered, and briefing schedule set, for the limited purposes of addressing two issues raised in the Motion to Reconsider, those being: (1) whether constructive notice of the contents of the Bankruptcy Code requires a conclusion that the CITY had inquiry notice of the underlying facts; i.e. did the CITY have inquiry notice that the 60 days had expired on the 6th of August, and if so, did the CITY's conduct evidence an intent to waive its rights; and (2) whether the doctrine of estoppel should be applied and, if so, would its application bring about a different result than the application of the doctrine of waiver. The

Court denied all other aspects of Debtors' MOTION TO RECONSIDER, specifically denying the Constitutional arguments in the motion as untimely since they had not been raised previously. The Court did not specifically address Debtors' MOTION FOR CONTINUANCE RE: CROSS-EXAMINATION OF DECLARANTS AS TO THE INTENT TO WAIVE A DEEMED REJECTION OF LEASE UNDER 11 U.S.C. § 365(d)(4). The Court then went on to hold the evidentiary hearing as originally scheduled, receiving the testimony of witnesses Rick Algert and James George III, along with marking of documentary evidence.

The hearing on Debtors' MOTION FOR RECONSIDERATION OF THE COURT'S RULING ON THE CITY OF MORRO BAY's MOTION THAT FURTHER FINDINGS BE MADE ON THE EXISTING RECORD came on as ordered by the Court on February 26, 1996, at 10:00 a.m. The CITY OF MORRO BAY was present by and through its attorney, David R. Hunt, Esq. The Debtors were present personally, and by and through their attorney, Michael Stelzer, Esq. Benning Richardson, Mary George, and James George IV, were also present in the court room. The Court received oral testimony of the witnesses and admitted the documentary evidence, and counsel argued their cases.

The Court having received the points and authorities offered by the parties, having considered the argument of counsel, and the sworn testimony of the witnesses and the documentary evidence admitted in the hearings, and after having considered all of the law, and the evidence and testimony, and after having weighed the credibility

of the witnesses, this Court makes the findings of fact, conclusions of law, and orders set out below.

## FINDINGS OF FACT

Initially, the Court recognizes the findings set out in its ORDER GRANTING MOTION FOR SURRENDER ORDER AND DENYING DEBTORS' MOTION TO ASSUME LEASE entered February 1, 1995, after hearing on December 21, 1994, not having been overturned on appeal to the District Court, are the law of the case, and does hereby affirm those findings, and sets them out verbatim as follows:

1. The Debtors failed to make a motion to assume the executory lease of non-residential real property within the sixty (60) days provided by 11 U.S.C. § 365(d)(4), and therefore, the lease was rejected as a matter of law.

2. There was no inequitable activity on the part of the CITY OF MORRO BAY in the handling of this matter.

3. The Debtors did not act diligently to protect their interests in the lease since they did not file a motion within the sixty (60) days as required under 11 U.S.C. § 365(d)(4) and waited until two (2) months after they received notice from the CITY OF MORRO BAY that they had rejected the lease as a matter of law by failing to file a motion to assume.

4. The percentage of gross sales rents calculated based upon revenues from July 1, 1993 through June 7, 1994, the date of the Order for Relief, are pre-petition debts which the CITY must refund to Debtors, but the

CITY had a good faith argument that the collection of those sums was appropriate since they became due and payable after the Order for Relief.

Now, after having further examined the record and after having considered all of the further law, argument, and evidence, and after having weighed the credibility of the witnesses, the Court makes the following further findings of fact:

5. Any payment of rent accepted by the CITY prior to September 15, 1994, was accepted without full knowledge of Debtors' failure to file a timely motion under 11 U.S.C. § 365(d)(4).

6. The CITY's conduct prior to September 15, 1994, including acceptance of rental payments on August 1, 1994, August 29, 1994, and September 12, 1994 and sending its correspondence dated August 12, 1994, did not constitute a waiver of Debtors' deemed rejection of their lease.

7. Debtors occupied the premises during the time when rental payments were accepted by the CITY.

8. The CITY did not, at any time or by any conduct, intentionally relinquish its right to have Debtors' assume their lease of non-residential real property through the filing of a motion under 11 U.S.C. § 365(d)(4).

9. There is no estoppel since there are no words, acts, or conduct by which one would reasonably infer the CITY was waiving its rights under the Bankruptcy Code and there is no evidence of any detrimental reliance by the Georges.

10. Debtors had unclean hands due to the prevarication of Mr. Stelzer, their attorney, when he told Mr. Hunt that a motion to extend the time to assume or reject had been filed when it had not.

## CONCLUSIONS OF LAW

The Court makes conclusions of law based upon the facts found above as follows:

1. The Debtors JAMES AND MARGIE GEORGE have rejected their executory lease of non-residential real property by failing to assume that lease within the time, and in the manner, set forth in Bankruptcy Code section 365(d)(4).

2. The lessor of non-residential real property, here the CITY, is imputed with knowledge of the Bankruptcy Code and its rights thereunder and thus it is imputed with knowledge of the period of time under 11 U.S.C. § 365(d)(4) expires. See, *In re VMS National Properties, Inc.*, 148 B.R. 942 (Bkrtcy.C.D. Cal, 1992).

3. A lessor is entitled to occupancy payments from debtors who continue to occupy premises after the Order for Relief, and, preemptively, the proper compensation for use and occupation is the amount of rent as fixed in the lease.

4. The acceptance of rental payments, without more, neither estops a lessor from asserting, nor constitutes a waiver by the lessor of the right to assert, automatic rejection under Section 365(d)(4).

5. There is not duty on the part of a lessor to seek rejection of a lease immediately upon the expiration of

the time for assumption set forth in Section 365(d)(4), and the failure to seek rejection can no more support a waiver or estoppel than can acceptance of rent.

6. The CITY did not waive its right to have Debtors' assume their lease of non-residential real property through the filing of a motion under 11 U.S.C. § 365(d)(4) nor Debtors' failure to make a timely motion as required by 11 U.S.C. § 365(d)(4).

7. Estoppel requires words, acts, conduct or acquiescence causing another to believe in the existence of a certain state of things, and second, willfulness, or negligence with regard to the acts, conduct, or acquiescence, and third, detrimental reliance by the other party upon the state of things indicated.

8. The CITY did not engage in any conduct, or make any statements, which would estop CITY from asserting Debtors' failure to assume their lease of non-residential real property.

9. Unclean hands is a defense to estoppel, and as found above, Debtors are guilty of unclean hands through their agent Michael Steltzer [sic].

10. In that Debtors JAMES AND MARGIE GEORGE have rejected the lease and the CITY has not waived the rejection and the CITY is not estopped from asserting the rejection, the Debtors' lease of non-residential real property is rejected and is no longer the property of the bankruptcy estate.

11. It is appropriate under *In re Elm Inn*, 942 F.2d 630 (9th Cir. 1991), for a lessor to seek, and the Bankruptcy Court to issue, an order requiring debtors to

immediately surrender premises formerly subject to a lease of non-residential real property where debtors failed to assume that lease under 11 U.S.C. § 365(d)(4), and the lessor need not seek an order for relief from stay prior to seeking a surrender order. *In re Elm Inn, supra.*

12. The Constitutional arguments raised by Debtors in their MOTION FOR RECONSIDERATION were not timely made in that they were not made at the time this matter was originally considered in this Court on December 21, 1994. Therefore, these arguments were not considered on their merits by this Court.

## ORDERS

On the basis of the above findings of fact and conclusions of law, the Court makes the following orders:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED the CITY's MOTION THAT FURTHER FINDINGS BE MADE ON THE EXISTING RECORD, OR IN THE ALTERNATIVE, FOR SETTING OF AN EVIDENTIARY HEARING shall be, and hereby is, granted and the further findings are entered as noted and made above.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that, after having fully, considered Debtors' MOTION FOR RECONSIDERATION OF THE COURT'S RULING ON THE CITY OF MORROW BAY's MOTION THAT FURTHER FINDING BE MADE ON THE EXISTING RECORD, said motion was granted for the purpose of reconsidering the prior decision of this Court, but as to the substance of the motion it shall be, and hereby is, denied.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that Debtors JAMES F. GEORGE, III and MARGIE R. GEORGE, and anyone claiming possession under or through them who had notice of these proceedings, including Chapter 7 Trustee, Michael Kogan, Benning Richardson, Mary George, and James George, IV, to the extent they assert a claim to the non-residential lease, must immediately surrender possession of the property described as Lease Sites 93, 93W, 94, 94W, 95, 95W, more commonly known as 901 - 915 Embarcadero, Morro Bay, California, to the CITY OF MORRO BAY.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that the CITY OF MORRO BAY is entitled to apply to this Court for issuance of a writ of possession for said property, and said writ of possession shall issue from this Court, and that said writ of possession may be served and executed by any duly authorized law enforcement agency, including the U.S. Marshal and/or the San Luis Obispo County Sheriff's Office.

Debtors' opposition to the form of this order is overruled. /s/ RLR

Dated: Apr. 12, 1996

/s/ Robin L. Riblet
HON. ROBIN L. RIBLET,
UNITED STATES
BANKRUPTCY JUDGE

PROPOSED ORDER PREPARED BY:

Dated: March ___, 1996.

HUNT & ASSOCIATES

By: /s/ David R. Hunt
David R. Hunt, Attorneys for
CITY OF MORRO BAY

MICHAEL W. STELZER #093274
Attorney at Law
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(805) 346-1600

Attorney for Debtors

**UNITED STATES BANKRUPTCY COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

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| In re<br><br>JAMES F. GEORGE, III, and MARGIE R. GEORGE,<br><br>Debtors. | Case No. ND 94-12409 RR<br>Chapter 7<br><br>ORDER DENYING HEARING ON DEBTORS' MOTION FOR NEW TRIAL, A NEW HEARING IN A CONTESTED MATTER, OR AMENDMENT OF JUDGMENT<br><br>(Jan. 31, 1997) |

GOOD CAUSE APPEARING:

The Debtors' Motion is Denied

DATED: JAN 31, 1997

/s/ **ROBIN L. RIBLET**
**ROBIN RIBLET**
**JUDGE OF THE BANKRUPTCY COURT, CENTRAL DISTRICT OF CALIFORNIA**

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL POSTAGE PREPAID TO ALL COUNSEL (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE.

DATED: OCT 6 1995

DEPUTY CLERK

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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| In re JAMES F. GEORGE, III and MARGIE R. GEORGE<br>Debtors in Possession. | No. CV 95-1300 ER<br>ORDER REMANDING TO THE BANKRUPTCY COURT<br>(Filed Oct. 6, 1995) |

The Court, having read and considered Appellants' papers in support of their appeal from the bankruptcy court's order granting the City of Morro Bay ("City")'s motion for a surrender order and denying the Appellants' motion to assume their lease, the opposing papers thereto, and all other matters before the court, and for the reasons stated in open Court, HEREBY ORDERS THAT

This case is REMANDED to the bankruptcy court for that court to conduct a factual analysis, with evidentiary hearing if necessary, to determine if the City evidenced

an intent to treat the lease in question as continuing, rather than terminated.

The Court finds that the rights and benefits given to a lessor under § 365(d)(4) of the Bankruptcy Code can be waived by a lessor. The requirements to finding of a waiver are: (1) the existence at the time of the waiver of a right, privilege, advantage or benefit; (2) the actual or constructive notice thereof; and (3) the intention to relinquish such right, privilege, advantage or benefit. *In re VMS National Properties,* 148 B.R. 942, 944 (C.D.Cal. 1992). The lessor's acts should be so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of the conduct is possible. *In re Food Barn Stores, Inc.,* 174 B.R. 1010, 1014 (W.D.Mo. 1994). To save the lease from forfeiture, all three elements must exist.

In the case at hand, the existence at the time of waiver of right is satisfied because, after the 60 day period, there existed a right for the lessor to force the debtor to surrender the premises. *See In re VMS,* 148 B.R. at 944. Furthermore, there was a constructive notice of the right because the City knew that it was dealing with a Chapter 11 debtor, and the City is constructively imputed with the knowledge of the Bankruptcy Code. *See Id.*

However, the bankruptcy court did not make any factual findings as to whether the City's conduct showed an intent to relinquish its rights under § 354(d)(4). If the bankruptcy court's factual findings are silent or ambiguous as to a material fact question, this Court must remand the case for the necessary factual determinations.

*In re Hall, Bayoutree Associates, Ltd.*, 939 F.2d 802, 804 (9th Cir. 1991).

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail or by telefax, copies of this Order on counsel for the parties in this matter.

Dated: OCT 6 1995

/s/ Edward Rafeedie
EDWARD RAFEEDIE
United States District
Court Judge

HUNT & ASSOCIATES
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Attorneys for Creditor, CITY OF MORRO BAY

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

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| JAMES F. GEORGE, III and MARGIE R. GEORGE<br><br>Debtors. | No. ND 94-12409 RR<br>Chapter 11<br><br>ORDER GRANTING MOTION FOR SURRENDER ORDER AND DENYING DEBTORS' MOTION TO ASSUME LEASE<br><br>Hearing Date: December 21, 1994<br>Hearing Time: 10.00 a.m.<br>Room 104<br><br>(Filed Jan. 30, 1995) |

The motion of the CITY OF MORRO BAY for a surrender order and the debtors' motion to assume the lease of non-residential real property came on regularly for hearing on December 21, 1994 at 10:00 a.m. in this court, the Honorable Robin Riblett [sic], Bankruptcy Judge presiding. The CITY OF MORRO BAY was present by and through its' attorney DAVID R. HUNT, City Attorney. The Debtors were present by and through their attorney,

MICHAEL STELZER, ESQ. Creditor SANTA LUCIA NATIONAL BANK was present by and through its' attorney ROBERT JONES, ESQ. Interested parties, and potential creditors, WILHELM and TINA HOPPE, were present by and through their attorney, C. RANDALL COOK, ESQ. The matter was argued and submitted on the points and authorities, declarations, and documentary evidence previously filed with the court, and on oral argument presented on that day. Based upon the record presented and the argument, the court rules as follows:

THE COURT HEREBY FINDS as follows:

1. The Debtors failed to make a motion to assume the executory lease of non-residential real property within the sixty (60) days provided by 11 USC § 365(d)(4), and therefore, the lease was rejected as a matter of law.

2. There was no inequitable activity on the part of the CITY OF MORRO BAY in the handling of this matter.

3. The Debtors did not act diligently to protect their interests in the lease since they did not file a motion within the sixty (60) days as required under 11 U.S.C. section 365(d)(4) and waited until two (2) months after they received notice from the CITY OF MORRO BAY that they had rejected the lease as a matter of law by failing to file a motion to assume.

4. The percentage of gross sales rents calculated based upon revenues from July 1, 1993 through June 7, 1994, the date of Order For Relief, are pre-petition debts which the City must refund to Debtors, but the City had a good faith argument that the collection of those sums was appropriate since they became due and payable after the order for relief.

Based upon the above findings and their application under the law,

IT IS HEREBY ORDERED that the motion of the CITY OF MORRO BAY for surrender order be, and hereby is, granted. Debtors are ordered to relinquish possession of the property known as Lease Site 93-95/93W-95W, and commonly known as 901-915 Embarcadero, Morro Bay, California, immediately to the CITY OF MORRO BAY, and if they do not so relinquish the premises, the CITY OF MORRO BAY may utilize state court process to recover possession.

IT IS HEREBY FURTHER ORDERED the CITY OF MORRO BAY shall refund to the estate the total amount of percentage of gross sales received by the City based upon sales from July 1, 1993 through June 7, 1994 and shall pay over to the estate the total amount of the security deposit still held by the City with respect to the lease site. Debtors attorney, MICHAEL STELZER, ESQ. shall place the entire amount of these funds in a segregated trust account and the funds shall not be disbursed without prior court approval.

IT IS HEREBY FURTHER ORDERED that the motion of Debtors for an order approving the assumption of an executory non-residential lease be, and hereby is, denied.

Dated this 30th day of ~~December, 1994~~ January, 1995.

/s/ Robin Riblet
UNITED STATES
BANKRUPTCY JUDGE

APPROVED AS TO FORM

HUNT & ASSOCIATES

By /s/ David R. Hunt
David R. Hunt, Attorney for the City of Morro Bay

MORLAN & JONES

By /s/ Robert M. Jones
Robert M. Jones, Attorney for Santa Lucia National Bank

C. RANDALL COOK, ESQ.

By /s/ C. Randall Cook
Attorney for Wilheim & Tina Hoppe
(Duplicate Signature Page for Mr. Cook's signature, *only*)

MICHAEL STELZER, ESQ.

By _____
Attorney for Debtors

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| In re: JAMES F. GEORGE, III & MARGIE R. GEORGE,<br>Debtors<br>JAMES F. GEORGE, III; MARGIE R. GEORGE,<br>Appellants,<br>v.<br>CITY OF MORRO BAY; SANTA LUCIA NATIONAL BANK; WILHELM HOPPE; TINA HOPPE; GORDON HELD; JULIA HELD,<br>Appellees. | NO. 97-56628<br>DC NO. CV-97-01463-ER<br>ORDER<br>(Filed Jul. 2, 1999) |

Before:: D.W. NELSON, FERNANDEZ, and W. FLETCHER, Circuit Judges.

The panel voted to deny the petition for rehearing. Judges Fernandez and W. Fletcher voted to reject the suggestion for rehearing en banc. Judge D.W. Nelson recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a

vote on whether to hear the matter en banc. Fed.R. App. P.35.

The petition for rehearing is DENIED, and the suggestion for rehearing en banc is REJECTED.